

# The media and scandalising: time for a fresh look

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## Introduction

Among the many issues that have increasingly engaged the attention of global free speech campaigners is the strikingly variable manner in which the law of contempt has been applied in different parts of the common law world. Of particular concern to the activists – and to journalists – is the unrelenting vigour with which the offence of “scandalising” judges<sup>1</sup> continues to be used against critics of the judiciary in certain former British colonies even as this offence has all but disappeared from the statute book of the “mother” country.<sup>2</sup> A large number of the modern prosecutions – in countries such as Singapore,<sup>3</sup> Mauritius,<sup>4</sup> Malaysia<sup>5</sup> and India<sup>6</sup> – have resulted in custodial sentences for the defendants concerned, often for utterances and writings that would be considered well within acceptable limits of legitimate criticism in democratic societies.

The consequent “chilling” effect that this stringent approach has had on free speech has been the subject of much activist, professional and academic comment over the past couple of decades.<sup>7</sup> It has been argued, among other things, that the law of “scandalising” has

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1 The offence is also known as “scandalising the court”.

2 The last reported case which resulted in a conviction in England and Wales appears to have occurred in 1931: *R v Colsey*, *The Times* (London), 9 May 1931, and even earlier in Scotland: *Alex Robertson* (1870) 1 Couper 404. An attempt, in 2000, to use the law of scandalising against a businessman who alleged that senior English judges were engaged in conspiring to pervert the course of justice was aborted after the Attorney General decided against taking any action – see C Dyer, “Businessman escapes jail after abusing judges”, *The Guardian* (London), 5 February 2000.

3 E.g. *Attorney General v Lingle* (1995) 1 SLR 696.

4 E.g. *Abnee v DPP* [1999] 2 AC 294.

5 E.g. *Murray Heibert v Chandra Sri Ram* [1999] 4 MLJ 321.

6 E.g. *In re Arundhati Roy*, Contempt Petition (Crim.) No. 10 of 2001, unreported decision of the Supreme Court of India dated 6 March 2002; *In re M K Tayal and others*, Contempt Case (Crim.) No. 7 of 2007, unreported decision of the High Court of Delhi dated 11 September 2007 (copy on file with the author).

7 See e.g. C Walker, “Scandalising in the eighties” (1985) 101 *Law Quarterly Review* 359; T Allen, “Scandalising the court: the impact of bills of rights” (2002) 10 *Asia Pacific Law Review* 1; G Robertson and A Nicol, *Media Law* 5th edn (London: Sweet & Maxwell 2008), pp. 403–62; M K Addo, *Freedom of Expression and the Criticism of Judges* (Aldershot: Ashgate 2000).

outlived its existence and deserves to be pensioned off, not least given the increasing importance that is being attached to freedom of expression around the world as evidenced by both the emerging jurisprudence of international adjudicatory bodies such as the European Court of Human Rights and the strong free speech guarantees contained in post-colonial domestic bills of rights. Whatever the merits of such calls for radical reform, they are not, however, likely to be heeded soon by politicians and legislators in the countries concerned for reasons which will be discussed below. It may consequently be more fruitful to look at alternative ways of lessening the impact of the “scandalising” offence and creating more space for media scrutiny of judicial performance and behaviour.

This article will argue that a strategic strengthening of the defences available to defendants, including the introduction of a new defence of “responsible journalism”, along the lines of the extended qualified privilege defence now available to media defendants in libel actions under English common law,<sup>8</sup> might offer a reasonable way forward. The merits of such a defence are that, while it would expand journalistic freedom to comment on matters concerning the judiciary and thus allow the media to play the “watchdog” role that is expected of it in open societies, it could also ensure that any such comment stays within the bounds of responsible behaviour and is consistent with the preservation of public confidence in the justice system. It will thus leave intact an important weapon in the armoury of the judiciary, to be resorted to in the most serious cases of unacceptable interference with the administration of justice.<sup>9</sup>

### Historical background and scope of “scandalising”

Contempt of court has been called “the Proteus of the legal world”<sup>10</sup> for the many forms that it assumes. The media risks falling foul of the law of contempt in at least two principal ways: by commenting on pending legal proceedings in a manner that is likely seriously to prejudice the outcome of those proceedings (“trial by media”); and by making imputations about judges which are likely to shake the public’s confidence in the independence and impartiality of the courts as dispensers of justice. The latter, called “scandalising”,<sup>11</sup> appears to have its origins in a curious 18th-century case which has been described by a contemporary writer thus:

[I]n 1765, the Crown obtained a rule nisi to attach John Almon for publishing a libel on Lord Mansfield, the Chief Justice. The alleged libel was contained in a pamphlet which stated that Lord Mansfield had acted “officiously, arbitrarily, and illegally” in acting out of court to amend an information against John Wilkes and intending to deprive Wilkes the benefit of the Habeas Corpus Act by requiring him to show cause for his discharge out of custody. The Court was ready to give judgment against Almon when it was discovered that the rule nisi had actually been brought against Wilkes. Wilmot J asked Almon’s counsel to allow an amendment to the rule, but he refused. Accordingly, the proceedings were

8 The defence was first articulated by the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, accessible at [www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/rey01.htm](http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/rey01.htm); and expanded upon in *Jameel v Wall Street Journal* [2007] 1 AC 359, accessible at [www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd061011/jamee-1.htm](http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd061011/jamee-1.htm) (both last accessed on 4 May 2009).

9 That such cases do exist is evidenced by, for example, the actions of one of Hong Kong’s most popular newspapers, the *Oriental Daily News*, which in the late-1990s engaged in a highly scurrilous and sustained campaign of abuse and intimidation against the territory’s higher judiciary. Those actions led to the editor and publisher of the newspaper being convicted of, and punished for, contempt in 1998: see, *Wong Yeung Ng v Secretary of Justice* [1999] HKCA 38.

10 J Muskovitz, “Contempt of injunctions, civil and criminal” (1943) 43 *Columbia L Rev* 780.

11 The offence goes by the name “murmuring judges” under Scottish law.

abandoned. Nevertheless, Wilmot kept the opinion which he had intended to deliver in his personal papers and, after his death, the opinion was circulated widely. It has now become the foundation for the modern law of contempt by scandalising the court.<sup>12</sup>

A variety of definitions have been offered of the concept in recent times. The Privy Council characterised it as

a convenient way of describing a publication which, although it does not relate to any specific case, either past or pending or any specific judge, is a scurrilous attack on the judiciary as a whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice.<sup>13</sup>

The High Court of Australia has held that the offence of scandalising would apply to any published matter that “excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office”.<sup>14</sup> The Court of Appeal of Hong Kong emphasised the interference that “scandalising” would cause to the administration of justice *as a continuing process*: consequently, any act which has the effect of “diminishing the authority of the court, bringing the court into disrepute and reducing public confidence in the system” would be caught by the definition.<sup>15</sup>

It is worth noting that the purpose of the offence is not to protect the dignity or reputation of individual judges. As ancient authority has it, the contempt power exists not “for the sake of judges, as private individuals, but because they are the channels by which the King’s justice is conveyed to the people”.<sup>16</sup> The authors of a more modern commentary on the subject explain the position as follows:

While it is true that the law of contempt is not concerned with the dignity of individuals taking part in the judicial process, or even with upholding respect for the law in any purely deferential sense, the administration of justice needs to proceed in circumstances of calm and dignity in order to be effective.<sup>17</sup>

The offence of scandalising was criticised by Justice Frankfurter as the “English foolishness”.<sup>18</sup> No comparable offence is to be found in the laws of the United States and it is a measure of the unfamiliarity of American judges with the concept that the courts there have sometimes misunderstood its purpose. Justice Dubin of the Court of Appeal of Ontario drew attention to this in a landmark Canadian case, noting the differences of approach between his country and its southern neighbour:

[W]ith respect, the criminal offences of contempt of court, with which we are dealing, is not for the purpose of “preserving the dignity of the bench” as the many cases to which I have referred demonstrate, and, with respect, I think has been misinterpreted in the American jurisprudence. It is apparent in

12 Allen, “Scandalising the court”, n. 7 above, at 1: The case of *R v Almon* is reported at (1765) Wilm 243. Another author, Ian Cram, however, notes that the offence of scandalising was acknowledged a few years earlier in the case of *Roach v Garvan* – also known as the *St James Evening Post* case – (1742) 2 Atk 468 at 471: see I Cram, *A Virtue Less Cloistered: Courts, speech and constitutions* (Oxford: Hart 2002).

13 *Chokalingo v Attorney General of Trinidad & Tobago* [1981] 1 WLR 106.

14 *Gallagher v Durack* (1983) 45 ALR 53.

15 *Wong Yeung Ng v Secretary of Justice* [1999] HKCA 38, para. 4 (per Mortimer JCA). The full text of this judgment is accessible at [www.hklii.hk/hk/jud/eng/hkca/1999/CACV000161A\\_1998-09360.html](http://www.hklii.hk/hk/jud/eng/hkca/1999/CACV000161A_1998-09360.html).

16 *R v Almon* (1765) Wilm 243 at 257. This distinction was also highlighted in *In the Matter of a Special Reference from the Bahama Islands* [1893] AC 138.

17 *Arlidge, Eady & Smith on Contempt* 2nd edn (London: Sweet & Maxwell 1999), pp. at 16–18. That the protection of judicial dignity was not the purpose of the law of contempt was also underlined by Lord Denning MR in *R v Commissioner of Police of the Metropolis, ex p Blackburn (No 2)* [1968] 2 QB 150 at 155.

18 *Bridges v California* 314 US 252 at 287 (1941).

reading American jurisprudence that the constitutional tradition and the philosophy underlying the manner in which justice is administered in the United States is different in many ways from that in Canada and throughout the Commonwealth.<sup>19</sup>

Part of the reason for the difference in approach is, of course, the paramount importance attached to free speech by the US Constitution.<sup>20</sup> As the rich jurisprudence of First Amendment cases illustrates, it has almost become an article of faith among American judges to put free speech values over and above other countervailing interests, including the need to insulate the judiciary from scurrilous attacks. As a result, a wide range of comment which would not pass muster even in a relatively liberal country such as England has gone unpunished in the United States. Examples include allegations of racist behaviour, corruption, dishonesty, ignorance, buffoonery, bullying, being drunk on the bench, and partiality on the part of judges.<sup>21</sup>

Nor has the tradition of enforced silence for the sake of judicial dignity taken deep roots in the United States. Such a silence, noted Justice Black of the US Supreme Court, “probably engenders resentment, suspicion, and contempt, much more than it would enhance respect”.<sup>22</sup>

The offence of scandalising has also been attacked on the grounds that it has the potential to violate, or could at least be perceived as violating, an important principle of natural justice. In crude terms, the charge is that the court assumes the twin roles of judge and prosecutor: whilst being the injured party (in terms of being the object of criticism), it is also empowered to sit in judgment over the guilt of its detractor. The results are entirely predictable:

For an institution which is necessarily much concerned with the appearance of impartiality and fairness, there is an obvious danger that a judgment unfavourable to the critic will be taken by some as evidence that the court has placed the protection of its own interests ahead of the public good.<sup>23</sup>

### Need for moderation and tolerance

One of the key principles that has emerged in the English jurisprudence on contempt – and which has passed into exhortatory folklore in the post-war era – is that the power to commit for scandalising should be used extremely sparingly. Lord Atkin’s oft-repeated dictum that “Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men”<sup>24</sup> encapsulates this principle

19 *R v Kopyto* (1987) 39 CCC (3d) 1 (Ont. CA), (1988) 47 DLR (4th) 213 at 287.

20 Other reasons include, in the opinion of one Australian judge, the variable quality of the state judiciary, the fact that US judges – at both federal and state levels – are able to exercise far-reaching powers of judicial review of legislation, and more generally the “formidable constitutional authority” enjoyed by American courts: see, R Sackville, “How fragile are the courts? Freedom of speech and criticism of the judiciary”, 13th Lucinda Lecture delivered at Monash University, 29 August 2005, accessible at [www.law.monash.edu.au/news/events/lucinda-lecture-2005.html](http://www.law.monash.edu.au/news/events/lucinda-lecture-2005.html) (last accessed on 4 May 2009), p. 12.

21 M H Freedman, “The threat to judicial independence by criticism of judges – a proposed solution to a real problem” (1997) 25 *Hofstra Law Review* 729.

22 *Bridges v California* 314 US 252 at 270–1 (1941). A more recent occupant of judicial office went so far as to declaim that people “should be permitted to say practically anything they please about judges and the courts – even untrue and vicious things” – M H Marshall, “Dangerous talk, dangerous silence: free speech, judicial independence and the rule of law” (2002) 24 *Syd L Rev* 455 at 455.

23 Sackville, “How fragile are the courts?”, n. 20 above, at p. 4.

24 *Ambarid v Attorney General for Trinidad and Tobago* [1936] AC 322 at 335.

admirably, and has received frequent lip-service even in countries where judicial tolerance of public criticism is not very high.<sup>25</sup>

The principle is based partly on the premise that the judiciary, like other public institutions, is expected to function within an environment of reasonable public scrutiny and criticism, and partly on the belief that judges, by virtue of their special – and somewhat sensitive – position, should be content to rely for their reputations and their dignity on the quality of their judgments rather than on open debate or, worse still, slanging matches with their critics.<sup>26</sup>

Judicial training goes some way in hardening judges to public and media criticism. As Cory JA put it in *R v Kopyto*, “the courts are not fragile flowers that will wither in the heat of controversy”.<sup>27</sup> More generally, judges have traditionally been seen as possessing broader backs than other public officials. In the words of the United States Supreme Court, they are “men of fortitude, able to thrive in a hardy climate”.<sup>28</sup> For this reason a distinction is often made between judges and juries, with the law on *sub judice* being applied more strictly to trials involving juries rather than to judges sitting alone. This has given rise to an assumption over the years that judges are, as a rule, not likely to be affected by media comment about their work. Lord Salmon put it in quite emphatic terms in a 1981 case: “I am and have always been satisfied that no judge would be influenced in his judgment by what may be said by the media.”<sup>29</sup>

But that view has sometimes been questioned, not least by judges themselves. Lord Justice Sedley, one of the more outspoken members of the English judiciary, has argued that judges may indeed be “affected in giving their decisions by concern at what the media reaction will be”.<sup>30</sup> He points to the unfettered nature of media comment on matters concerning the judiciary:

In Britain today there is effectively no limit not only to the extent but to the degree of comment to which parts of the press are prepared to subject judges. Within the last few years, to take a simple example, a conscientious and able High Court judge was described by a tabloid journalist – not some hack but a leading political commentator – as a weevil in the body politic because he had given a decision against the Home Secretary in relation to the conditions of imprisonment of IRA prisoners. It’s difficult, by contrast, to remember when one last read an editorial commending a judge for taking an unpopular but principled decision. Ministers for their part have in the not too distant past been prepared to use the lobby system of unattributable briefings, dependant as it is on compliant journalists, to launch attacks on judges whose decisions they have found it easier to criticise than to appeal.<sup>31</sup>

If that analysis is correct, the pendulum of media behaviour seems to have swung quite markedly from one extreme to the other because, only a few decades earlier, it was being

25 Another celebrated dictum that has echoed around the common law world is Lord Salmon’s assertion that “no criticism, however rigorous, can amount to contempt of court, provided it keeps within the limits of reasonable courtesy and good faith”: *R v Commissioner of Police of the Metropolis, ex p Blackburn (No 2)* [1968] 2 QB 150 at 155.

26 As often as not, judicial reticence in the matter of public engagement with critics is born of a self-imposed code of conduct rather than any legally enforceable canon of judicial behaviour.

27 *R v Kopyto* (1987) 39 CCC (3d) 1 (Ont. CA) at 14–15 (per Cory JA).

28 *Craig v Harney* (1947) 331 US 367 at 376.

29 *Attorney General v British Broadcasting Corporation* [1981] AC 303 at 342.

30 S Sedley, “Foreword” to M K Addo, *Freedom of Expression and the Criticism of Judges* (Aldershot: Ashgate, 2000), p. x.

31 *Ibid.* p. ix.

said that the effect that the many successful prosecutions which had been brought for scandalising in the earlier part of the 20th century was to engender an “almost unbroken sycophantic praise for judges”.<sup>32</sup>

Be that as it may, there is yet another, compelling, reason why judges are expected to be more tolerant of public criticism than they have ever been in the past. This has to do with the expanding horizons of judicial activism. Beverley McLachlin, the current Chief Justice of Canada, put her finger on the matter when she observed, as far back as 1994, that:

The lawmaking role of the Judge in Commonwealth countries has dramatically expanded. Judicial lawmaking is no longer always confined to small, incremental changes. Increasingly, it is invading the domain of social policy, formerly the exclusive right of Parliament and the legislature.<sup>33</sup>

That is certainly true of jurisdictions such as India where the highly controversial practice of “public interest litigation” has led to the judiciary spearheading massive schemes of social engineering, often in blatant disregard of well-established norms on the separation of powers and through orders that are inconsistent, arbitrary and ad hoc in the extreme.<sup>34</sup> It should scarcely cause surprise if such judicial forays into policy-making draw sharp criticism from professional as well as lay sources, sometimes in language that is uncomfortably robust for the judges concerned.

The problem has been compounded by an alarming decline in the standards of competence and/or ethics on the Bench in some of these jurisdictions either as a result of inadequate quality control or unacceptable political interference at the time of judicial appointments. Inevitably, this has led to public dissatisfaction with the judiciary which in turn has found expression in increasingly vigorous critiques of judges and their work. The attacks have sometimes been brought forth by judicial indiscretion, even misconduct, as will become evident from some of the cases described below and, where the judicial behaviour being complained of has gone unchecked by the authorities, the criticism can be seen as a legitimate exercise in calling the judges publicly to account. The use of the contempt power in such circumstances raises a number of serious issues which deserve closer examination.

Quite independently of the above is the policy-laden question as to whether judges should enjoy greater protection than other public figures. That is a question which is beyond the scope of this article and will therefore not be addressed.<sup>35</sup> However, it is worth noting that the special position enjoyed by judges in the common law system is deeply rooted in the historical image of the judge as a high-ranking representative of the monarch – a conception which has surprisingly survived the decline in the powers of the monarchy.

### Place of apology

A curious aspect of the approach to scandalising which has not received as much attention as it perhaps ought to is the importance that common law courts have attached to the expression of contrition by the alleged contemnor. This is reflected in the invariable practice of the courts giving defendants an opportunity to apologise at an early stage, or at

32 B Abel-Smith and R Stevens, *Lawyers and the Courts* (London: Heinemann 1967), pp. 126–7.

33 B McLachlin, “The role of judges in modern Commonwealth society” (1994) 110 *Law Quarterly Review* 260 at 263.

34 For a critique of public interest litigation in India, see V Iyer, “Judicial activism in the Supreme Court of India” in B Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (New York: Oxford University Press 2007), pp. 121–68.

35 The issue has, however, been discussed at some length in works such as I Cram, *A Virtue Less Cloistered*, n. 12 above.

any rate prior to sentencing, and thus “purge” themselves of the contempt. While the practice has helped to temper the rigour of the law with a degree of leniency, its wider purpose is somewhat questionable, as one writer on the subject has pointed out:

Given that the rationale for punishment for scandalising is that the offending remarks undermine the confidence of the community in the administration of justice, it might have been thought that a publicised retraction, rather than an apology to the court – which may not necessarily be publicised – would be the principal ground of mitigation of penalty.<sup>36</sup>

The former course of action appears to find favour with judiciaries in the civil law system.<sup>37</sup>

### Variations in application of the law

A trawl through the jurisprudence on scandalising contempt reveals significant divergences in approach around the common law world. For a start, the offence is one of strict liability in some countries – for instance, England and Wales, Australia, New Zealand, India, Singapore – but requires actual intent in others – for example, South Africa, Canada. For another, the offence has withstood the scrutiny of domestic bills of rights in certain jurisdictions (for instance, Hong Kong) but not in others (for example, Canada).<sup>38</sup> More strikingly, there are significant differences in the tolerance thresholds for criticisms that are the subject-matter of contempt proceedings.

At a semantic level, American jurisprudence appears to exercise a degree of influence on the courts of some Commonwealth jurisdictions but the trend is far from universal. The “clear and present danger” test adopted by the US judges<sup>39</sup> has found an echo in Canada (where the test of “clear, serious and immediate” danger<sup>40</sup> was accepted) but a variant of it (“real, substantial and immediate” risk)<sup>41</sup> was rejected in Hong Kong, with the court believing – as did the Privy Council earlier – that the test should differ “according to the needs of the jurisdiction concerned”.<sup>42</sup>

In practical terms, while there appears to be a consensus that “scurrilous” attacks on judges deserve condign punishment,<sup>43</sup> actual practice on the application of this standard has demonstrated worryingly wide variations, as the following selection of cases demonstrates.

In *R v Kopyto*, the court had to deal with comments from a disgruntled lawyer who, having lost a case that he had fought on behalf of a client, lashed out at the Bench in the following terms:

36 M Chesterman, “Contempt: in the common law, but not the civil law” (1997) *ICLQ* 521 at 536.

37 E.g. in France (Article 434-44 of the French Criminal Code), which allows the court to order the defendant to publicise, at his or her own cost, the proceedings in question.

38 In Australia, a statutory form of the scandalising offence, contained in the Industrial Relations Act 1988, was struck down as violative of the “freedom of political communication” clause of the country’s constitution because it provided for an overbroad protection against any criticism, including fair comment, directed at the Industrial Relations Commission: *Nationwide Pty Ltd v Wills* (1992) 177 CLR 106.5.

39 See e.g. the dictum of Justice Black in *Bridges v California* 314 US 252 (1941) that free speech could only be curtailed where “the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about . . . substantive evils” (at 261).

40 *R v Kopyto* (1987) 39 CCC (3d) 1 at 8.

41 *Wang Yeung Ng v Secretary of Justice* [1999] HKCA 38, at para. 33.

42 *Ibid.* at para. 37. The Privy Council took a similar view in *McLeod v St Aubyn* [1899] AC 549.

43 See e.g. *R v Gray* [1900] 2 QB 36.

This decision is a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune as long as someone above you said to do it. Mr Dawson and I have lost faith in the judicial system to render justice. We're wondering what is the point of appealing and continuing this charade of the courts in this country which are wrapped in favour of protecting the police. The courts and the [Royal Canadian Mounted Police] are sticking so close together you'd think they were put together with Crazy Glue.<sup>44</sup>

Although the lawyer, Mr Kopyto, was convicted of contempt, he succeeded in having his conviction set aside on appeal. The Ontario Court of Appeal ruled that the remarks in question, vigorous and highly contentious though they were, did not cross the acceptable bounds of free speech. As to his argument that the law of scandalising contempt was violative of the right to freedom of expression guaranteed by the Canadian Charter on Rights and Freedoms, the court was unable to reach a definitive view.

In a more recent case from Scotland, a radical lawyer, Amer Anwar, one of whose clients had been convicted of terrorism offences, read out a statement outside the High Court in Edinburgh which, among other things, described the evidence led against his client as “farcical” and condemned the verdict as “a tragedy for justice and for freedom of speech and [one which] undermines the values that separate us from the terrorist”. Mr Anwar was charged with contempt<sup>45</sup> and in the trial that followed he advanced the defence that he had merely articulated the views of his client. This defence was given short shrift by the judges, but the court nevertheless concluded that his conduct did not reach the high threshold required for a conviction. Mr Anwar was, however, sharply rebuked for failing to live up to the professional standards expected of a solicitor, and the Law Society of Scotland was asked to consider the need for any further action against him on disciplinary grounds.

Another case which highlights judicial sensitivity to criticism arose in Sri Lanka, where a Member of Parliament and former Cabinet Minister, D M S Banda, was accused of contempt after he was quoted in the media as saying, in the context of a reference that had been made to the Supreme Court of that country for its opinion on a constitutional matter, that he and some of his fellow MPs “would not accept any shameful decision the Court gives”. After a summary trial, Mr Banda was convicted and sentenced to two years’ rigorous imprisonment without any possibility of appeal.<sup>46</sup> One of the consequences of the punishment was that he subsequently forfeited his seat in Parliament and was disqualified from seeking re-election for a period of seven years from the date of completion of his prison sentence.<sup>47</sup> The case became the subject-matter of a complaint to the Human Rights Committee of the United Nations which, in a scathing verdict, expressed the view that

44 *R v Kopyto* (1988) 47 DLR (4th) 213 at 219.

45 The indictment cited an omnibus definition of contempt used in a previous case, viz. “conduct that denotes wilful defiance of, or disrespect towards, the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law itself, whether in civil or criminal proceedings”: *Robertson and Gough v HM Advocate* 2008 JC 146 at para. 29.

46 Among the many disturbing aspects of this case was a reported refusal by the Chief Justice to recuse himself from hearing it despite an application from Mr Banda who had, along with a number of other MPs, previously signed a parliamentary motion for the Chief Justice’s removal on grounds of corruption and unsuitability for office. Mr Banda also cited a number of other reasons in support of his contention that the Chief Justice had already been biased against him – see UN Human Rights Committee, views on Communication No 1373/2005, accessible at <http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/160f6e7f0fb318e8c1256d410033e0a1/e3da1d675e92ae1dc12574be003ea22a?OpenDocument> (last accessed 3 May 2009).

47 Under Sri Lankan law, any MP who absents him or herself from Parliament for a continuous period of three months or more automatically forfeits his or her seat.

neither the summary nature of the trial nor the severe penalty that was imposed on Mr Banda was warranted by his conduct.<sup>48</sup>

Yet another example of what has been regarded as an oppressive use of the contempt power arose in Singapore, where a visiting American academic, Christopher Lingle, was charged and convicted for scandalising on the basis of an article published in the *International Herald Tribune* in which he had expressed the view that certain (unnamed) governments in Southeast Asia had used considerable ingenuity in suppressing political dissent.<sup>49</sup> In particular, Professor Lingle referred to the practice of these governments to use defamation laws to bankrupt opposition politicians with the help of pliant judiciaries. Although the *Tribune* maintained that the criticism was not directed at Singapore, the country's High Court ruled that it did constitute contempt, and it imposed a fine of S\$10,000 against Professor Lingle and smaller fines against the publisher and Asia editor of the newspaper.<sup>50</sup> Prior to conviction, Professor Lingle was subjected to intensive interrogation by the Singapore police which led him to flee the country before the conclusion of the case.

An equally controversial prosecution, and one which resulted in the defendant actually being imprisoned, occurred in neighbouring Malaysia in 1997. Here, a correspondent for the *Far Eastern Economic Review*, Murray Heibert, had published a story which discussed litigiousness in that country and referred to the surprise that had been expressed by many over the speed with which a civil suit that had been filed by the wife of a sitting Court of Appeal judge against an international school had "raced through Malaysia's legal labyrinth".<sup>51</sup> Mr Heibert was immediately charged with contempt and sentenced to three months' imprisonment, with the trial judge holding that the article had "scandalised the court, was calculated to excite prejudice against the plaintiff, and was designed to exert pressure on the court".<sup>52</sup> Although the sentence was subsequently reduced to six weeks and Mr Heibert released after four weeks for good behaviour, the verdict was viewed with serious concern by the media and by free speech campaigners.<sup>53</sup>

The Pacific region has fared no better. In one particularly egregious example involving allegations of forum-shopping in the criminal courts, a magistrate to whom a high-profile incest case had been mysteriously transferred slapped contempt charges against the public prosecutor, a journalist and a leading newspaper after the prosecutor had asked the magistrate for information about the transfer. Midway through the case, the magistrate also approached the accused journalist and asked him to plead guilty in return for a non-custodial sentence and a better job at another newspaper. When these facts were put in the public domain, the proceedings descended into a farce. Mercifully, the High Court

48 UN Human Rights Committee in Communication No 1373/2005, n. 46 above.

49 The article had been written in response to an earlier opinion piece published in the same newspaper by a senior Singaporean bureaucrat who had argued that European governments were in many respects inferior to their Asian counterparts.

50 The remarks also resulted in defamation suits being successfully brought against the newspaper by the former Prime Minister of Singapore, Lee Kuan Yew. Mr Lee further threatened to pursue a similar claim against Professor Lingle – see, Reporters' Committee for Freedom of the Press, *Update*, accessible at: [www.rcfp.org/newsitems/index.php?i=1084](http://www.rcfp.org/newsitems/index.php?i=1084) (last accessed 4 May 2009).

51 "See you in court", *FEER*, 23 January 1997. The suit alleged discrimination by the school against the plaintiff's son, who was a student there, after he had been excluded from the school's debating team.

52 Committee to Protect Journalists, "High Court jails Canadian journalist for contempt", accessible at <http://cpj.org/1999/09/high-court-jails-canadian-journalist-for-contempt.php> (last accessed 4 May 2009).

53 See e.g. "Malaysia sentences journalist from Canada for contempt", *New York Times*, 12 September 1998, accessible at [www.nytimes.com/1999/09/12/world/malaysia-sentences-journalist-from-canada-for-contempt.html?fta=y](http://www.nytimes.com/1999/09/12/world/malaysia-sentences-journalist-from-canada-for-contempt.html?fta=y) (last accessed 4 May 2009).

intervened and administered a sharp rebuke to the magistrate, holding that no case for contempt had been made in the first place.<sup>54</sup>

Much concern has also been expressed in recent years over the contempt prosecutions launched in India against critics of that country's judiciary. Not dissimilar allegations of judicial bias to those raised in *R v Kopyto* were made by a communist politician in India who, echoing the views of Marx and Engels, asserted during a press conference that: "Judges are guided by class hatred, class interests and class prejudice and where the evidence is balanced between a well-dressed pot-bellied rich man and a poor ill-dressed and illiterate man the Judge instinctively favours the former."<sup>55</sup> The Supreme Court of India ruled that the remarks in question merited punishment because of their *tendency* to lower the prestige of judges and courts in the eyes of the people. The contemnor was ordered to pay a fine or undergo imprisonment for one month.<sup>56</sup> Constraints of space do not permit an exhaustive listing of other, more recent, Indian cases, but the following representative samples are indicative of the emerging trend:

- In 1990, the editor of a leading vernacular newspaper, Madhav Gadkari, was convicted and sentenced to six months' imprisonment after he wrote an article alleging misconduct by several unnamed judges of the Bombay High Court. Mr Gadkari's plea that he should be allowed to prove the truth of his allegations was turned down.<sup>57</sup>
- In 2001, the editor and publisher of a news magazine, *Wah India*, were held to have scandalised the judiciary after the periodical published the results of an anonymous survey in which lawyers practising in the Delhi High Court had rated judges of that court on the basis of their knowledge, competence, punctuality, etc. The editor and publisher were let off with a warning after they tendered an apology to the court, but copies of the magazine in which the survey had appeared were ordered to be confiscated and the press enjoined from revealing the findings of the survey.<sup>58</sup>
- In 2002, a writer and human rights activist, Arundhati Roy, was convicted and sentenced to "symbolic" imprisonment for one day and fined Rs 2000 by the Supreme Court of India for criticising, in an affidavit, the court's "disquieting inclination . . . to muzzle dissent, to harass and intimidate those who disagree with it".<sup>59</sup>
- In 2005, a trade unionist, Rajendra Sail, was convicted and sentenced to six months' imprisonment after he denounced a judgment of the Madhya Pradesh High Court which acquitted the alleged murderer of another union

54 *Syed Muktar Shah v Elizabeth Rice*, unreported case, cited in "Contempt of court", paper delivered by Mrs Justice Nazahat Shameem at the Attorney General's Conference, Suva, December 2004, accessible at <http://documents.ag.gov.fj/Contempt-Shameem.pdf> (last accessed 4 May 2009).

55 *E M S Nambodiripad v T N Nambiar* AIR 1970 SC 2015.

56 Bizarrely, the court expressed the view that the contemnor had misguided himself about the true teachings of Marx, Engels and Lenin.

57 *V M Kanade v Madhav Gadkari* 1990 Cr LJ 190. In 2006 the Indian Parliament amended the Contempt of Courts Act 1971 to allow truth to be pleaded as a defence, as long as the alleged contemnor could also show that the impugned statements were made for the public benefit.

58 *Surya Prakash v Madhu Trehan* 2001 Cr LJ 3476 (Del.). It is worth noting that when a similar survey had been carried out – and published – by *Legal Business*, a leading trade journal in England, the English judiciary did not deem it necessary to take any action.

59 *In re Arundhati Roy*, judgment of Justices G B Pattanaik and R P Sethi dated 6 March 2002, unreported, cited in V Venkatesan, "Of criticism and contempt", *Frontline* (New Delhi), 16–29 March 2002, accessible at [www.hinduonnet.com/fline/fl1906/19060270.htm](http://www.hinduonnet.com/fline/fl1906/19060270.htm) (last accessed 4 May 2009).

activist. Mr Sail's allegation that the judiciary had "no guts" to punish the wealthy and the powerful was seen as meriting a custodial sentence.<sup>60</sup>

- In 2007, the publisher, two journalists and a cartoonist of a Delhi-based newspaper, *Mid-Day*, were each convicted and sentenced to four months' imprisonment after the paper carried an article and a cartoon alleging that a former Chief Justice of India had engaged in nepotism and other questionable conduct while in office.<sup>61</sup> This case is notable for the fact that the court disregarded the defendants' plea to prove the truth of their allegations, despite the law specifically allowing them to do so.<sup>62</sup>

It is difficult to resist the conclusion that, in most of the cases considered above, there has been an "oppressive or vindictive use of the court's powers", contrary to the warning administered by the presiding judge in *Milburn* over six decades ago.<sup>63</sup>

### The case for retention

That said, there have been occasions – even if few and far between – when a strong response from the judiciary has probably been justified. A classic example is provided by the behaviour of Hong Kong's largest circulating Chinese language newspaper, the *Oriental Daily News*, which in 1997 launched a vitriolic campaign that targeted some members of the territory's judicial fraternity. Among other things, the newspaper described members of the Obscene Articles Tribunal as "dogs and bitches", "scumbags", and "public enemy of freedom of the press and a public calamity to the six million citizens of Hong Kong"; denounced two senior judges, Rogers J and Godfrey JA, as "British white ghosts" and "pigs"; and threatened to "wipe [them] all out". For good measure, the newspaper also physically hounded Justice Godfrey, with a team of reporters and photographers following him day and night for two days, ostensibly to "educate him in the ways of the paparazzi".<sup>64</sup>

Unsurprisingly, these actions resulted in the editor and publisher of the newspaper being charged and convicted for contempt.<sup>65</sup> A custodial sentence of four months was justified by the court in the following words:

The campaign which the *Oriental Daily News* waged against the Judiciary was without parallel in modern times. The features of this prolonged and sustained campaign which made it so unique include the venom of the language which was used, the outrageousness of the motives which it ascribed to its targets, and . . . the impact which the campaign had on public confidence in the ability of Hong Kong's judges to dispense justice conscientiously and impartially.

60 *Rajendra Sail v Madhya Pradesh High Court Bar Association* (2005) 6 SCC 109. On appeal, the sentence was reduced to one week's imprisonment by the Supreme Court of India.

61 A specific allegation made against the Chief Justice was that he had passed a controversial order in a property-related matter which was calculated to bring material benefit to two of his sons. The article also alleged that the Chief Justice had allowed his sons to use his official residence to carry out their business activities.

62 *In re M K Tayal and others*, Order dated 11 September 2007 in Contempt Case (Crim.) No 7 of 2007, Delhi High Court (per R S Sodhi and B N Chaturvedi JJ).

63 *Milburn* 1946 SC 301 at 315 (per Lord President Normand).

64 *Wong Yeung Ng v Secretary of Justice* [1999] HKCA 38, at para. 69.

65 A similar result ensued in another highly publicised contempt case in South Australia in 2006. Here, a popular radio presenter, Bob Francis, told his listeners to "smash" a "judge's face in" after a magistrate had considered a bail hearing for a convicted paedophile. Mr Francis was given a suspended sentence of nine months' imprisonment and asked to post an 18-month good behaviour bond of A\$2000 – see, "DJ avoids jail for contempt", [www.news.com.au/entertainment/story/0,28383,20247560-10388,00.html](http://www.news.com.au/entertainment/story/0,28383,20247560-10388,00.html) (last accessed 4 May 2009).

... [W]hat was at stake in the *Oriental Daily News*' campaign was not the outcome of an individual case but nothing less than the rule of law itself ... It was this ultimate challenge to the rule of law which makes these contempts probably the most serious examples of "media" contempts which the courts in the common law world have ever encountered.<sup>66</sup>

Cases such as these vindicate the view that it might be a step too far to abolish the offence of scandalising, notwithstanding the passionate pleas that are often advanced in favour of such far-reaching reform.<sup>67</sup>

Cultural relativism has loomed large in most discussions on scandalising contempt, much to the frustration of free speech campaigners of the universalist persuasion. The argument that is usually advanced by such campaigners involves a comparison with the United States where, as noted above, no legal protection is offered for the administration of justice as a continuing process. Despite this, argue the campaigners, the American judicial system appears to enjoy a high reputation, and there is no reason why this position cannot be replicated in Commonwealth countries.

The riposte – offered by, among others, Justice Mortimer of the Hong Kong Court of Appeal – is that a combination of Commonwealth tradition and the specific needs of individual countries militates against the universalist model.<sup>68</sup> The latter point was underlined by the Privy Council – albeit in language which is unlikely to endear itself to modern liberal commentators – as far back as 1899: “[I]t must be considered,” said their Lordships, “that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court.”<sup>69</sup>

Disregarding the controversial language, it is not difficult to see that there is some evidence to substantiate the argument. It is unlikely, therefore, that the offence of scandalising will disappear quickly from the statute books of those Commonwealth countries where it currently exists.<sup>70</sup>

### Proposal for reform

Given this reality, a more fruitful approach to resolving the problem might be to strengthen the defences that are available to those charged with contempt. Some jurisdictions, such as Australia, already recognise a defence of fair comment. Although this defence is undoubtedly helpful, especially to media defendants, its value is somewhat limited because it covers only comments, not factual assertions of the type that frequently feature in the scandalising cases. A smaller number of countries, including India, allow truth to be pleaded, either on its own or coupled with circumstances where it can be shown that the assertion in

66 “DJ avoids jail”, n. 65 above, judgment of the Divisional Court cited in para. 69 of CA judgment.

67 At least one well-known expert in this field has argued against abolition: see C. J. Miller, *Contempt of Court* 3rd edn (New York: Oxford University Press 2000), p. 596.

68 *Wong Yeung Ng v Secretary of Justice* [1999] HKCA 38, at para. 37.

69 *McLeod v St Aubyn* [1899] AC 549 at 561 (per Lord Morris). Tom Allen has called this remark “racist”: see, Allen, “Scandalising the court”, n. 7 above, p. 5.

70 It may be noted, in passing, that at least one official body within the Commonwealth has recommended the abolition of the scandalising offence. In a report published in 1987, the Australian Law Reform Commission argued that there was no justification for the offence in its existing form, and that it should be replaced by a narrower offence of “publishing an allegation imputing misconduct to a judge or magistrate”: Australian Law Reform Commission, *Contempt* (Report No. 35, 1987).

question is in the public interest. This defence would of course cover factual assertions and is therefore of immense benefit to defendants, but its value too is often diminished by the many practical difficulties that those charged with contempt face in adducing proof – for example, of judicial corruption – to the standards required in a court of law.

In the circumstances, the case for a defence of “responsible journalism”, based on the principle of qualified privilege now available to media defendants in defamation cases under English law, appears compelling. This principle has been in use in the area of libel law in England,<sup>71</sup> Australia<sup>72</sup> and New Zealand<sup>73</sup> for at least a decade now, and is seen as capable of adaptation to contempt proceedings.<sup>74</sup>

### Qualified privilege and contempt

The traditional foundation of qualified privilege, namely the presence of a reciprocal duty and interest between the publisher and the recipient of information,<sup>75</sup> has, in *Reynolds* and related cases, been seen as satisfied when a media organ (that is a newspaper or broadcaster) communicates information of public interest to its readers, listeners or viewers. The defence is available as long as the media defendant acts without malice and conforms to certain standards of “responsible journalism” that are calculated to inform public debate of significant public issues: these would include taking reasonable steps to verify the information before publication, making efforts to obtain a comment from the subject of the story (or at least giving a gist of it), checking the credibility of the source of the information, and couching the story in a non-sensationalist tone.<sup>76</sup>

An attempt to confine the defence to “political information”, rather than any information of public interest, was firmly rejected by the House of Lords, which declared that all matters of serious public concern should be protected.<sup>77</sup> This development is particularly pertinent in the context of the proposed extension of the defence to contempt, because the imputations that have traditionally attracted prosecution have covered a field wider than is encompassed by the term “political information”. Typically, the allegations would involve monetary or other forms of corruption, serious misconduct, bias, succumbing to political and other pressures, and extra-judicial conduct of a kind that is likely to discredit the judiciary in the eyes of the public.

71 See, *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (House of Lords); see, also, *Jameel v Wall Street Journal Europe* [2007] 1 AC 359 (see n. 8 above), where the principle was developed further.

72 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (High Court of Australia).

73 *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1998] 3 NZLR 424 (New Zealand CA).

74 C J Miller notes that, although “any analogy between defamation proceedings instigated by politicians and proceedings for a criminal contempt of court by scandalising the court is tenuous . . . [it is not] far-fetched”: Miller, *Contempt of Court*, n. 67 above, p. 588.

75 See e.g. *Harrison v Bush* (1855) 5 E & B 344 at 348; *Watt v Longsdon* [1930] 1 KB 130 at 147.

76 These standards were put in the form of a 10-point “check list” by Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (see n. 8 above): see “Conclusions” part of His Lordship’s speech (unfortunately, the paragraphs are not numbered in the official online version of the judgment). “Responsible journalism” was defined by the same judge in a later case as “the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals” – *Bonnick v Morris* [2003] 1 AC 300 at 309.

77 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (see also n. 8 above) (per Lord Nicholls). “[I]t would,” asserted his Lordship, “be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern. The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today’s conditions, to the importance of freedom of expression by the media on all matters of public concern.”

The advantage of allowing qualified privilege as a defence to scandalising contempt is that it would allow for a responsible airing of such allegations and facilitate an informed discussion of matters touching the judiciary in society at large. It has the potential simultaneously to reduce the room for ill-founded speculation and put the judges themselves on notice that bad behaviour will no longer be shielded from public scrutiny. Well-founded attacks on the judiciary, even if expressed in robust or colourful language, will promote a better understanding of the institution and those who are charged with running it. Such criticism can be seen as one of the many ways in which the courts can be made accountable to the people.<sup>78</sup>

The defence has enormous potential to advance the cause of constructive investigative journalism through the generous allowance it makes for genuine mistakes and wrong-headed – even untrue – assertions, as long as those assertions are sincerely and reasonably believed by those making them.<sup>79</sup> And lest this freedom degenerate into licence, adequate safeguards have been built into the defence to prevent its misuse. The warning administered by Lord Cooke of Thorndon underlined the importance that the House of Lords attached to this aspect of the matter:

Although investigative reporting can be of public benefit, the commercial motivation of the press and other sections of the media can create a temptation, not always resisted, to exaggerate, distort or otherwise unfairly represent alleged facts in order to excite the interest of readers, viewers or listeners.<sup>80</sup>

Understandably, one of the objections that can be taken to the use of the extended qualified privilege defence is that the concept of “reasonable journalism” on which it rests is rather vague and therefore dependant on the subjective view of the judge who presides over a particular trial. This criticism will doubtless be coupled with the more general complaint that is made with regard to contempt litigation, namely, that there is a structural problem of lack of impartiality which remains as stubborn as ever. One commentator has, rather starkly, called it “judicial freemasonry”:<sup>81</sup> it relates to the strong public perception that judges deciding contempt cases often close ranks with their brethren against whom the alleged contemptuous remarks have been directed. Unfortunately, this is a problem which does not readily admit of a solution. As Michael Addo has pointed out, “The factor of inevitability – that is to say, judges alone under the system of government have this responsibility for adjudicating disputes of this nature – makes it impossible to remove the cases involving criticism of their colleagues from their jurisdiction.”<sup>82</sup> The situation can, however, be ameliorated to some extent by a clear and inflexible procedural requirement that

78 Some scepticism was, it needs to be pointed out, expressed over the validity of this argument in the Australian case of *John Fairfax Publications Pty Ltd v O'Shane* [2005] NSWCA 164, accessible at [www.lawlink.nsw.gov.au/scjudgetments/2005nswca.nsf/ba8ff0f7f4dcfb74ca256739000a724f/8c15e33d0f227c49ca2570040001a50b?OpenDocument](http://www.lawlink.nsw.gov.au/scjudgetments/2005nswca.nsf/ba8ff0f7f4dcfb74ca256739000a724f/8c15e33d0f227c49ca2570040001a50b?OpenDocument) (accessed 4 May 2009), at para. 97.

79 But not, it has to be added, where such belief is absent. See e.g. observations of Lord Hobhouse of Woodborough in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (see also n. 8 above): “To attract privilege the report must have a qualitative content sufficient to justify the defence should the report turn out to have included some misstatement of fact. It is implicit in the law’s insistence on taking account of the circumstances in which the publication, for which privilege is being claimed, was made that the circumstances include the character of that publication. Privilege does not attach, without more, to the repetition of overheard gossip whether attributed or not nor to speculation however intelligent.”

80 *Ibid.*

81 C Warbrick, “The European Convention on Human Rights” (1989) 9 *Yearbook on European Law* 439 at 445.

82 M K Addo, “Are judges beyond criticism under Article 10 of the European Convention on Human Rights?” (1998) *ICLQ* 425 at 431.

forbids any judge who is the target of allegedly contemptuous remarks from being personally involved, however tangentially, in the adjudication of cases arising from such remarks.

As for the criticism that “responsible journalism” is a vague concept, the issue was tackled head on by Lord Hoffmann in *Jameel* thus:

[T]he standard of responsible journalism is as objective and no more vague than standards such as “reasonable care” which are regularly used in other branches of law. Greater certainty in its application is attained in two ways. First, as Lord Nicholls said, a body of illustrative case law builds up. Secondly, just as the standard of reasonable care in particular areas, such as driving a vehicle, is made more concrete by extra-statutory codes of behaviour like the Highway Code, so the standard of responsible journalism is made more specific by the Code of Practice which has been adopted by the newspapers and ratified by the Press Complaints Commission. This too, while not binding upon the courts, can provide valuable guidance.<sup>83</sup>

Lord Hope was equally emphatic that the concept of “responsible journalism” offered a judicially manageable standard for the courts to act on:

The duty-interest test based on the public’s right to know, which lies at the heart of the matter, maintains the essential element of objectivity. Was there an interest or duty to publish the information and a corresponding interest or duty to receive it, having regard to its particular subject matter? This provides the context within which, in any given case, the issue will be assessed. Context is important too when the standard is applied to each piece of information that the journalist wishes to publish. The question whether it has been satisfied will be assessed by looking to the story as a whole, not to each piece of information separated from its context.<sup>84</sup>

At the level of policy, too, context is important. The rapidly expanding conceptions of democracy and public empowerment around the world should dictate a progressive liberalisation of contempt law in much the same way as has happened in the area of defamation law. The time has arguably come for a reappraisal of the rationale for, and objectives of, the contempt power, and in particular the power to punish for “scandalising”.

### Mechanics of reform

Happily, given both the reach and adaptability to change of the common law, reform in this area need not be as painful as it might be in some of the more rigid legal systems. As Lord Cockburn has noted:

Whatever disadvantages attach to a system of unwritten law, and of those we are fully sensible, it has at least this advantage: that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generations to which it is immediately applied.<sup>85</sup>

Where for cultural or other reasons it is felt that the common law may not be an appropriate route to follow, reform can just as easily be achieved through legislation. An

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83 *Jameel v Wall Street Journal Europe* [2007] 1 AC 359, at para. 55.

84 *Ibid.* at para. 107.

85 *Wason v Walter* (1868) LR 4 QB 73 at 93.

analogous statute from New South Wales, Australia, offers some guidance.<sup>86</sup> This law provides for a defence of statutory qualified privilege in defamation cases under the following circumstances, namely, where:

- (a) the recipient has an interest or apparent interest in having information on some subject;
- (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
- (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances.<sup>87</sup>

Furthermore, the Act offers guidance on how the court might judge the “reasonableness” of the publisher’s conduct. It requires him to establish:

- (a) that, before publishing the matter complained of, he exercised reasonable care to ensure that he got his conclusions right, (where appropriate) by making proper inquiries and checking on the accuracy of his sources;
- (b) that his conclusions (whether statements of fact or expressions of opinion) followed logically, fairly and reasonably from the information which he had obtained;
- (c) that the manner and extent of the publication did not exceed what was reasonably required in the circumstances; and
- (d) that each imputation intended to be conveyed was relevant to the subject about which he is giving information to his readers.<sup>88</sup>

These formulations combine precision with comprehensiveness and can usefully be adapted to any new statutory defence of extended privilege.

Important as the proposed reform is, there is one further innovation that is desirable for the liberalisation of the law in this area is to become truly meaningful. This would be to make the proposed new defence available to a wider range of defendants. For understandable reasons, the benefits of the reform introduced by *Reynolds* were confined to media defendants, but, given the history of contempt prosecutions, a plausible case can be made for extending the protection to all critics of the judiciary. This would, for example, cover allegedly contemptuous statements disseminated not only through the media but through, say, a public meeting. Quite clearly, the safeguards that govern the use of the defence – in particular the requirement of “reasonableness” on the part of the person making the statement – should continue to apply in such cases as they would in cases involving the media.<sup>89</sup>

### Prospects for reform

For all the highly persuasive nature of the case in favour of the proposed reforms, the prospects of them being implemented fairly quickly are, it has to be admitted, at best mixed. Despite the geographically wide reach of the common law, there are formidable political and practical obstacles in individual jurisdictions which cannot be lost sight of. The idea will inevitably be received with greater enthusiasm in some countries than in others. Where the

<sup>86</sup> Defamation Act 1974.

<sup>87</sup> S. 22.

<sup>88</sup> S. 22(1)(c)(4).

<sup>89</sup> It is more than likely, of course, that such statements would in any case be carried by the media, although it is worth noting that there have been occasions when the authorities have been selective in their choice of targets for prosecution, with the media not being named as co-defendants.

matter is left to be dealt with by the judiciary, the fate of reform will vary according to both the level of interest it generates among senior judges and the extent to which the higher judiciary is free of external (for example, political) influence in such matters.

It is highly likely, for example, that the proposal for change will meet with a lukewarm response in a country like Singapore where, among other things, the superior courts have signalled their reluctance to accept decisions such as *Reynolds* in the recent past.<sup>90</sup> A similar result can be envisaged in neighbouring Malaysia where the past few months have seen the emergence, within parts of the judiciary and the political establishment, of a desire to distance the country from its historical heritage of English common law.<sup>91</sup> On the other hand, the proposal stands a good chance of being accepted in a country like India where, despite all the shortcomings of the legal system, the superior courts have shown a remarkable – if occasionally cack-handed – receptivity to ideas from abroad.<sup>92</sup>

In countries where there is no doctrinal or ideological opposition to the reception of such ideas but where, for practical or logistical reasons, reform through the common law is unlikely to take shape quickly, legislation may be the solution. This would also be preferable in jurisdictions where the common law tradition has gradually given way to a culture of codification.

Where neither the judiciary nor the legislature is likely to be receptive to change, the best that can be hoped for is that a sustained campaign, involving both domestic and international pressure groups, might generate the necessary popular momentum for reform, even if only over the medium to long term. The impetus for a radical shift in public attitudes is sometimes provided by one or two high profile cases of gross injustice or widely felt unease over the oppressive use of the contempt power, which can then be used as a rallying point by the campaigners to force change. Often a precipitous decline in the standards of judicial conduct, gross politicisation of the judiciary, or unprincipled judicial activism can act as a catalyst for change.

## Conclusion

For all the high-sounding rhetoric that has emerged from judges and legal policy-makers around the Commonwealth about the need for the power of contempt to be exercised sparingly, actual practice in this area reveals a depressingly illiberal picture. The harsh manner in which this power has been deployed in many jurisdictions, in circumstances where it has had the effect of stifling legitimate criticism of judges and their behaviour, lends credence to the cynical view that the oft-repeated judicial entreaties for restraint are ritualistic and little more than “a conventional nod to a well-meaning sentiment”.<sup>93</sup>

90 This defence was sought to be used in a high-profile defamation case brought by Lee Kuan Yew, the former Prime Minister of Singapore, and Lee Hsien Loong, the current Prime Minister, against the Singapore Democratic Party in 2006, but it was decisively rejected. The justification offered by the court for its rejection was that “The terms of art 14 of our Constitution (right of free speech) differ materially from . . . art 10 of the European Convention on Human Rights”: see reference in [http://presspedia.journalism.sg/doku.php?id=defamation\\_act](http://presspedia.journalism.sg/doku.php?id=defamation_act) (last accessed 4 May 2009).

91 See e.g. “Malaysia considers switch to Islamic law”, *The Telegraph* (London), 1 September 2007, accessible at [www.telegraph.co.uk/news/worldnews/1561896/Malaysia-considers-switch-to-Islamic-law.html](http://www.telegraph.co.uk/news/worldnews/1561896/Malaysia-considers-switch-to-Islamic-law.html) (last accessed 4 May 2009).

92 A good example of such receptivity is to be found in the decision of the Supreme Court of India in *Rajagopal v State of Tamil Nadu* JT (1994) 6 SC 514, where the court accepted the principle – first enunciated in *Derbyshire County Council v Times Newspapers Ltd* [1993] 2 WLR 449 – that governmental bodies should be barred from initiating actions for defamation unless they could show actual malice on the part of the defendants.

93 M Kotsounouris, “Criticising judges in Ireland” in M K Addo, *Freedom of Expression and the Criticism of Judges* (Aldershot: Ashgate 2000), p. 53.

Given this reality, and the increasing incidence of the contempt power being used oppressively against critics of the judiciary – often in circumstances where the justification for such use is at best tenuous – the time is clearly ripe for liberalisation of the law in this area. Calls for the abolition of the offence of scandalising, usually favoured by free speech activists, are unlikely to be heeded by governments for practical as well as political reasons. In the circumstances, a more fruitful – and more realistic – option would be to strengthen the defences available to critics of the judiciary and, in particular, to introduce a new defence of extended qualified privilege analogous to the *Reynolds* defence now available to media defendants in libel actions in some common law jurisdictions.

The introduction of such a defence would offer a principled, workable and doctrinally sustainable solution to this long-standing problem. It would strike a better balance between the competing demands of freedom of expression, on the one hand, and the sanctity of the justice administration system on the other, as required by the growing body of international human rights law and by the expanding conceptions of participatory democracy the world over.